"substantial federal question" doctrine, the "artful pleading" doctrine and the theory that, as FCC licensees, Petitioners were "acting under" a federal officer or agency of the United States. C.A. App. 360. In attempting to identify a substantial federal question, the notices of removal asserted that each "suit essentially attacks the RF emission standards established by federal regulation." C.A. App. 361. Petitioners went on to outline a "comprehensive and uniform regulatory framework for all wireless telephone services" (C.A. App. 363). While admitting that Respondents "assert only state law causes of action" (C.A. App. 366), the removal notices argued that "the elements of those causes of action will require this Court to resolve substantial disputed questions of federal law." C.A. App. 366.

Respondents filed timely motions pursuant to 28 U.S.C. §1447(c) to remand each of the four actions for lack of subject matter jurisdiction. In memoranda opposing the remand motions, Petitioners relied upon the three grounds stated previously in their notices of removal and also added a fourth—the "complete preemption" doctrine. Thereafter, on October 31, 2001, acting on motion of the Petitioners, the Judicial Panel on Multidistrict Litigation ordered transfer of the cases for consolidated pretrial proceedings in the United States District Court for the District of Maryland.

On June 21, 2002, following briefing and argument, the district court denied the Respondents' motions to remand. Pet. App. 95a. Characterizing the state-law claims as a "disguised attack on federal regulations" (Pet. App. 54a), the court ruled that the claims necessarily depend upon resolution of a substantial federal question. Pet. App. 57a-79a. Other asserted grounds for removal were considered but rejected. Pet. App. 79a-95. In finding federal question jurisdiction, the district court went far beyond the complaints to present a detailed analysis of the comprehensive nature of federal regulation of RF emissions, including the text and legislative history of the Telecommunications Act of 1996. Pet. App.

60a-69a. From that analysis the district court concluded that Respondents' claims "put the validity of the federal regulations, and the process by which they were developed, directly in dispute." Pet. App. 71a. The court added: "Although none of these claims explicitly challenge the FCC's radiation exposure guidelines, an examination of the class plaintiffs propose and the remedy plaintiffs request reveals that the true gravamen of these complaints is to attack the lack of a headset requirement under the federal RF safety rules." *Ibid.* These stated concerns led the district court to conclude that state court adjudication of Respondents' claims would be incompatible with the federal regulatory regime:

> While state courts ultimately might conclude that they are preempted from regulating the wireless industry on the basis of RF concerns, the risk of fifty different states articulating fifty different rules about whether and to what extent they may set RF safety standards could create market instability and prevent the maintenance of an unimpeded national network of rapid and efficient telecommunications service, a goal of significant importance in national commerce and security. With these federal interests figuring so centrally to [Respondent] plaintiffs' case, removal is fully justified.

Pet. App. 76a-77a.

Petitioners next moved pursuant to Rule 12(b)(6), F.R.C.P., to dismiss Respondents' lawsuits on the ground that all of the claims were preempted by federal law. On March 5, 2003, without reaching other theories of preemption, the district court dismissed the actions on the basis of conflict preemption. *In re Wireless Telephone Radio Frequency Emissions Prod. Liab. Litig.* 248 F. Supp. 2d 452 (D. Md. 2003).[3] Spe-

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[3] Petitioners' Appendix does not contain the district court's opinion and order dismissing these actions pursuant to Rule 12(b)(6), reported at 248 F. Supp. 2d 452, although the opinion is relevant to the judgments

cifically, the district court ruled that the relief sought was inconsistent with Congress's objective of achieving national uniformity in regulating RF radiation levels for all wireless communications. *Id.*, 463. The district court incorporated by reference its earlier opinion upholding federal-question jurisdiction (*id.*, 457, n.1) and cited many passages from that opinion as supporting a finding of conflict preemption. *Id.*, 458-60, 461n.12, 463-65.

A panel of the court of appeals reversed. Pet. App.43a. The panel was divided over the existence of a substantial federal question, the dissenting judge being in accord with the district court's analysis of that issue. Pet. App. 43a-47a. The panel majority (Luttig and Michael, Circuit Judges) held that removal of these four cases could not be sustained on the basis of a substantial federal question. Pet. App. 25a. After a fact-intensive examination of the complaints (Pet. App. 9a-10, 13a-18a), the majority found "one thing is clear: the elements of each of the claims depend only on the resolution of questions of state law." Pet. App.18a. It held that "[t]he district court erred by not recognizing that its inquiry was limited by the well-pleaded complaint rule" (*ibid*) and in allowing removal by anticipating the defense of preemption urged by Petitioners. Pet. App.19a. In response to arguments that certain claims raised federal issues, the majority found that the arguments were either "wrong" (Pet. App. 20a) or a "mischaracterization" of the claim. Pet. App. 21a. Finally, the panel rejected Petitioner's theory that a "sufficient connection" of the claims to a federal regulatory scheme might suffice to establish federal question jurisdiction. Pet. App. 22a-24a.

Having determined that the claims do not arise under federal law under any of the removal theories, the panel majority

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entered by that court and by the court of appeals. Supreme Court Rule 14.1(i).

held that district court lacked subject-matter jurisdiction over the four cases, making their removal improper. Pet. App. 28a. Accordingly, the district court lacked power in those cases to consider or decide the preemption issues raised by Petitioners in their Rule 12(b)(6) motion to dismiss. *Ibid.* As a result, the court of appeals returned the cases to the district court for remand of each case to the state court in which it originated. Pet. App. 43a. Without dissent, it denied Petitioners' rehearing petition. Pet. App. 99a. In conformity with the mandate of the court of appeals, the district court remanded each action to the originating state court, where the action is now pending.[4]

ARGUMENT

THE DECISION BELOW IS COMPATIBLE WITH THE PRINCIPLES OF *GRABLE* AND OTHER RELEVANT PRECEDENTS IN DETERMINING THAT THESE CASES DO NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION; REMAND FOR RECONSIDERATION OF THE DECISION BELOW IS UNNECESSARY.

On June 13, 2005, two months after the Fourth Circuit had rendered its decision and denied a petition for rehearing, this Court handed down *Grable & Sons Metal Prods., Inc. v. Darue, Eng'g & Mfg.*, __ U. S. __, 125 S. Ct. 2363 (2005). In *Grable*, this Court re-examined the "substantial federal question" doctrine and concluded that there is " no single, precise, all-embracing" test for identifying federal questions that will support jurisdiction under 28 U. S. C. §1331. *Grable*, 125 S. Ct. at 2368, quoting *Christianson v. Colt*

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[4] Despite the literal terms of 28 U.S.C. § 1447(d), this Court's certiorari jurisdiction would appear to be unaffected by the district court's order remanding these four cases and transferring the records to the state courts, where the cases are now pending. *See Aetna Cas. & Sur. Co. v. Flowers*, 330 U.S. 464, 466-67 (1947).

Ind. Operating Corp., 486 U. S. 800, 821 (1988) (Stevens, J., concurring).

Petitioners urge this Court to grant the writ of certiorari, vacate the judgment below and remand these cases to the Fourth Circuit for reconsideration in light of *Grable*. Petition, at 4, 9-10, 18. For reasons that follow, Respondents disagree and oppose remand. While lacking the benefit of *Grable*, the court of appeals applied the principles recognized in other relevant precedents of this Court that remain viable and vital today. The Fourth Circuit panel decision rests upon four bedrock principles, correctly stated and properly applied in the majority opinion:

- Federal question jurisdiction is determined by the "well-pleaded complaint" rule, which holds that courts ordinarily look no further than the plaintiffs' complaint in determining whether a lawsuit raises issues of federal law capable of creating federal question jurisdiction. Pet. App., 11a-12a, 18a.
- If federal law does not create the cause of action, the rule requires a complaint to establish that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law, in that federal law is a necessary element of one of the well-pleaded claims. Pet. App. 12a, 13a.
- A plaintiff is "master of the claim" and may avoid federal jurisdiction by exclusive reliance on state law in drafting the complaint. Pet. App. 12a.
- A preemption defense that raises a federal question is inadequate to confer federal jurisdiction. Pet. App. 19a. A case may not be removed to federal court on the basis of a federal defense, including the defense of preemption, even if the defense is anticipated in the plaintiff's complaint, and even if both parties admit that the defense is the only question truly at issue in the case. Pet. App, 13a, 19a.

These propositions are basic and anchored by a century of federal jurisprudence. If they have been displaced by *Grable*, then it remains for this Court and this Court alone to say so after plenary review. In the meantime, this Court's precedents supporting these propositions are binding upon the Fourth Circuit, which applied them before to these cases and may be expected to apply them again if called upon to do so. A remand to the court of appeals for reconsideration in light of *Grable* is unnecessary and a likely waste of judicial resources. We respectfully submit that the decision below is entirely consistent with *Grable* and should not be disturbed.

As this Court acknowledges, federal question jurisdiction is usually invoked by pleading a cause of action created by federal law. *Grable*, 125 S. Ct. at 2366. "As a general rule, absent diversity jurisdiction, a case will not be removable if the complaint does not affirmatively allege a federal claim." *Beneficial Nat. Bank v. Anderson*, 539 U. S. 1, 6 (2003). There is a "less frequently encountered" qualification of this rule, however. *Grable*, 125 S. Ct. at 2366. This Court has "recognized for nearly 100 years that in certain cases federal question jurisdiction will lie over state-law claims that implicate significant federal issues." *Id.* No bright line can be drawn but *Grable* has added focus to the inquiry. Thus, "the question is, does a state-law claim necessarily raise a *stated* federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities." *Grable*, 125 S. Ct. at 2368 (emphasis added).

The inquiry posed in *Grable* should be understood as resting upon two implicit assumptions. The federal issue (1) must be "stated" in the plaintiff's own complaint (125 S. Ct. at 2368) and (2) must constitute an essential element of plaintiff's state-law claim. *See Gulley v. First Nat. Bank in Meridian*, 299 U. S. 109, 112-13 (1936). The quiet title action in *Grable*, for example, was premised on a failure of the IRS

to give the plaintiff adequate notice, as defined by federal law. 125 S.Ct. at 2366, 2368. "Whether Grable was given notice within the meaning of the federal statute is thus an *essential element* of its quiet title claim, and the meaning of the federal statute is actually in dispute; it appears to be the only legal or factual issue contested in the case." *Id.* at 2368 (emphasis added). Obviously, then, *Grable* presented this Court with a claim in which a federal issue constituted an "essential element" of the state-law cause of action.

The "well-pleaded complaint" rule was tacitly acknowledged in *Grable* in that a "stated" federal issue was presented. In these four cases, the court of appeals applied that rule in line with this Court's prior decisions. Pet. App.12a, 18a-19a. Ordinarily, federal-question jurisdiction turns on the "well-pleaded complaint" rule. *Aetna Health, Inc. v. Davila*, 542 U. S. 200, 124 S. Ct. 2488, 2495 (2004); *Oklahoma Tax Comm'n. v. Graham*, 489 U. S. 838, 840 (1989). The rule "has long governed whether a case 'arises under' federal law for purposes of 28 U. S. §1331." *Holmes Group, Inc. v. Vornado Air. Systems, Inc.*, 535 U. S. 826, 830 (2002). The rule operates "on the principle that that federal jurisdiction generally exists 'only when a federal question is presented on the face of the plaintiff's properly pleaded complaint.'" *Id.*, 831, quoting *Caterpillar Inc. v. Williams*, 482 U. S. 482 U. S. 386, 392 (1987). The allegations of the complaint are controlling. Whether federal-question jurisdiction exists "must be determined from what necessarily appears in the plaintiff's statement of his own claim in the bill or declaration, unaided by anything alleged in anticipation or avoidance of defenses which it is thought the defendant may interpose." *Taylor v. Anderson*, 234 U. S. 74, 75-76 (1914). *See Aetna Health*, 124 S. Ct. at 2494; *Oklahoma Tax Comm'n.*, 489 U. S. at 841; *Christianson v. Colt Ind. Op. Corp.*, 486 U. S. 800, 808 (1988); *Franchise Tax Bd. of California v. Construction Laborers Vacation Trust*, 463 U. S. 1, 10 (1983).

The decision below observed that state law created all of the Respondents' claims, but the inquiry did not stop there. Pet. App. 12a. The panel inquired further "whether these cases fall within the small class of 'cases in which a well-pleaded complaint establishes . . . that the plaintiff's right to relief necessarily depends on the resolution of a substantial question of federal law, in that federal law is a necessary element of one of the well-pleaded . . . claims.'" Pet. App. 12, quoting *Christianson*, 486 U. S. at 808, and *Franchise Tax Bd.*,, 463 U. S. at 13. A meticulous count-by-count evaluation of each state-law claim in the four cases (Pet. App. 12a-18a) led the panel to conclude that "one thing is clear: the elements of each of the claims depend only on the resolution of state law." Pet. App. 18a. Parts of the complaints targeted by the Petitioners and by the dissenting judge were also reviewed and explained in context. Pet. App. 20a-22a.

The Petition attacks this conclusion as contradicting *Grable* by applying what they depict as "a bright-line rule that gives conclusive weight to one factor (such as whether a particular element of a state law claim turns on federal law)", to the exclusion of "other factors" that Petitioners want considered. Petition, at 11. *Grable* itself, however, rests upon a plain finding that a substantial and disputed federal question constituted "an essential element" of the quiet title claim. 125 S. Ct. at 2368. The "essential element" test is entirely compatible with *Grable*'s assurance that the federal question presented must be substantial, disputed and necessary to resolve. *Ibid.* If a federal question is not an essential element of a state cause of action, then it is not placed in "dispute" and the right to relief does not depend upon its resolution. Such a claim is not one "arising under the Constitution, laws or treaties of the United States." 28 U. S. C. §1331.

Moreover, the reference in *Grable* to an "essential element" was not a stray remark but is supported by precedents cited in the opinion. For example, Mr. Justice Cardozo is

quoted for his famous explanation that the exercise of federal-question jurisdiction calls for "a common-sense accommodation of judgment to [the] kaleidoscopic situations that present a federal issue, in a selective process which picks the substantial causes out of the web and lays the other ones aside." *Gully*, 299 U. S. at 117-18, as quoted in *Grable*, 125 S.Ct. at 2367. And yet it was Mr. Justice Cardozo's opinion in *Gully* that reaffirmed the test, then already "well-established", that federal law "must be an *element*, and an *essential* one, of plaintiff's cause of action." *Id.*, 299 U. S. at 112 (emphasis added). *See Rivet v. Regions Bank of Louisiana*, 522 U. S 470, 475 (1998). *Grable* also quoted an earlier opinion for its conclusion that "the facts showing the plaintiff's title and the existence and invalidity of the instrument or record sought to be eliminated as a cloud upon the title are *essential parts of the plaintiff's cause of action.*" *Hopkins v. Walker*, 244 U. S. 486, 490 (1917), as quoted in *Grable*, 125 S. Ct. at 2368-69 (emphasis added). In short, there is simply no merit in the contention here that the decision below went astray in testing the complaints in these actions in accordance with the "essential element" standard.[5]

Petitioners urge a wide-ranging consideration of "other factors" (Petition, at 11) that lie outside the complaint. Ap-

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[5] As they did in their petition for rehearing in the Fourth Circuit, Petitioners complain that the decision below conflicts with the Fourth Circuit's earlier decision in *Ormet v. Ohio Power Co.*, 98 F.3d 799 (4th Cir. 1996), while adding that this Court has "endorsed" *Ormet* in *Grable*. Petition, at 16. The majority opinion, which was authored by a member of the panel which decided *Ormet*, carefully distinguished that decision from the other. Pet. App. 22a-24a. After the decision below had been rendered, Petitioners sought rehearing and rehearing en banc, inviting the Fourth Circuit to resolve the asserted conflict with *Ormet*. No member of the Court (including the member who wrote the *Ormet* opinion) requested a poll on the petition for rehearing en banc. Pet. App.99a. The petition for rehearing was denied by the panel, without dissent.

parently, these "other factors" would include the Petitioners' own added embellishments regarding the FCC regulatory scheme, their asserted compliance with FCC regulations, and even the legislative history of the Telecommunications Act of 1996. Petition, at 13-14[6]. Petitioners injected these matters into all four cases in their notices of removal. C.A. App. 360-367. Defensive submissions that supplement the complaint, however, if given weight, "would undermine the clarity and ease of administration of the well-pleaded-complaint doctrine" and radically expand the class of removable cases. *Holmes Group*, 535 U. S. at 832.

Under the "well-pleaded complaint" rule, as Mr. Justice Cardozo also has observed, "the controversy must be disclosed upon the face of the complaint, unaided by the answer or by the petition for removal." *Gully*, 299 U. S. at 113. *See Caterpillar*, 482 U. S. at 392. Over the years, this Court has rejected proposals that the defendant's notice of removal, the defendant's answer or a counterclaim to the complaint should be consulted before making a determination of federal-question jurisdiction. *Holmes Group*, 535 U. S. at 831. *See Franchise Tax Bd.*, 463 U. S. at 10-11, n.9; *The Fair v. Kohler Die & Specialty Co*, 228 U. S. 22, 25 (1913). Federal courts are admonished to "examine the 'well pleaded'

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[6] Although irrelevant to removal jurisdiction, the Petition's excursion into legislative history illustrates the hazards of the journey. The Petition states that "Congress specifically identified nationally uniform RF emissions standards as a legislative objective", and then quotes a committee report as proof of that statement. Petition, at 13-14 quoting H.R. Rep. No. 104-204, pt. 1 (1995), reprinted in 1996 U.S.C.C.A.N. 10, 61. One problem with the committee report is that it dealt with the siting of antenna, cell stations, and infrastructure-related equipment, rather than wireless telephones sold or leased to consumers. *Id.* A greater problem facing Petitioners is that the committee report spoke to a bill that was never enacted.

allegations of the complaint and ignore potential defenses." *Beneficial National Bank*, 539 U.S. at 6.

> [A] *defendant* cannot, merely by injecting a federal question into an action that asserts what is plainly a state-law claim, transform the action into one arising under federal law, thereby selecting the forum in which the claim shall be litigated. If the defendant could do so, the plaintiff would be master of nothing.

Caterpillar, 482 U. S. at 399 (emphasis in original; fn omitted).

Another corollary of "[t]he well-pleaded complaint rule makes the plaintiff the master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law." *Caterpillar*, 482 U. S. at 392 (fn. omitted). It does not suffice that the facts alleged in support of an asserted state-law claim would *also* support a federal claim. *Beneficial Nat. Bank*, 539 U. S. at 12 (Scalia, J., dissenting). *See Caterpillar*, 482 U. S. at 395 (plaintiffs "could have brought suit under [federal law]; [a]s masters of the complaint, however, they chose not to do so"). *See also Great Northern R. Co. v. Alexander*, 246 U. S. 276, 282 (1918)("the plaintiff may by the allegations of his complaint determine the status with respect to removability"); *Healy v. Sea Gulf Specialty Co.*, 237 U. S. 479, 480 (1915)("the plaintiff is absolute master of what jurisdiction he will appeal to"); *The Fair v. Kohler Die & Specialty Co.*, 228 U. S. 22, 25 (1913)("[o]f course the party who brings a suit is master to decide what law he will rely upon"). Nor does it "suffice that the facts alleged in support of an asserted state-law claim *do not support* a state-law claim and would *only* support a federal claim." *Beneficial Nat. Bank*, 539 U. S. at 12 (Scalia, J., dissenting; emphasis in original). "Jurisdiction may not be sustained on a theory that the plaintiff has not advanced." *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U. S. 804, 809, n.6 (1986).

In the district court, Petitioners argued at length that the resolution of claims in these actions under state law would pose an irreconcilable conflict with federal legislative policies and FCC regulation. The district court adopted much of their argument. *See* discussion, *supra* at p. 7-8. In so doing, the district court disregarded a major corollary of the "well-pleaded complaint" rule. Its ruling was condemned on that account. Pet. App. 18a-19a. Preemption is a defense to a complaint and may not be invoked to justify removal. *Beneficial Nat. Bank*, 539 U.S. at 6. "A defense that raises a federal question is inadequate to confer federal jurisdiction." *Merrell Dow Pharmaceuticals*, 478 U. S. at 808. *See Rivet*, 522 U.S. at 475 ("[a] defense is not part of a plaintiff's properly [p]leaded statement of his or her claim"). See *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 63 (1987). "[S]ince 1887 it has been settled law that a case may not be removed to federal court on the basis of a federal defense, including the defense of preemption, even if the defense is anticipated in the plaintiff's complaint, and even if both parties concede that the federal defense is the only question truly at issue." *Franchise Tax Bd.*, 463 U.S. at 14. *See Rivet*, 522 U.S. at 475. *Caterpillar*, 482 U.S. at 393. "By unimpeachable authority, a suit brought upon a state statute does not arise under an act of Congress or the Constitution of the United States because prohibited thereby." *Gully*, 299 U.S. at 116. *See Rivet*, 522 U.S. at 476. In short, the presence of a federal question "in a defensive argument does not overcome the paramount policies embodied in the well-pleaded complaint rule—that the plaintiff is the master of the complaint, that a federal question must appear on the face of the complaint, and that the plaintiff may, by eschewing claims based on federal law, choose to have the cause heard in state court." *Caterpillar*, 482 U. S. at 398-399.

Petitioners do not question the panel's determination that conflict preemption was the real thrust of their argument for removal based on a federal question. Instead, Petitioners shift

ground and assert that their self-proclaimed compliance with federal regulations has "qualitative significance" that should count for something. Petition, at 13. As the decision below recognizes, however, any such compliance constitutes a *defense* to claims under the laws of Georgia, Maryland and New York (Pet. App. 20a), just as it does in most other jurisdictions. *See Geier v. American Honda Motor Co.*, 529 U. S. 861, 869-70 (2000) (citing *Restatement (Third) of Torts: Products Liability*, §4(b), comment *e* (1997)); see *id.*, 892-93 (Stevens, J., dissenting).[7] Even "the existence of a federal immunity to the claims asserted does not convert a suit otherwise arising under state law into one which, in the statutory sense, arises under federal law." *Oklahoma Tax Comm'n.*, 489 U. S. at 481.

Nothing in the *Grable* decision either repudiates or displaces the "well-pleaded complaint" rule or its several corollaries. The rule "is the basic principle marking the boundaries of the federal-question jurisdiction of the federal district courts." *Metropolitan Life*, 481 U. S. at 64. That rule (and the policies supporting it, *see Holmes Group*, 535 U.S. at 831-32) is both too firmly established and too recently articulated to necessitate further review of the rule's application in these cases. *See Aetna Health*, 124 S. Ct. 2488 at 2494 (whether a particular case arises under federal law ordinarily turns on the "well-pleaded complaint" rule). The statutes controlling federal-question removal jurisdiction, 28 U.S.C. §§1331 and 1441(a), have been amended several times since the well-pleaded complaint rule was developed. That rule and its corollaries now form an integral part of the "congressionally approved balance of federal and state

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[7] Pennsylvania law attaches no legal significance to product compliance. Pet. App. 20a-21a. The Petition also notes two federal decisions upholding FCC regulation of RF emissions. Petition, at 14, n.2. The preclusive effect of a prior federal judgment, if any, is a defense that will not provide a basis for removal. *Rivet*, 522 U. S. at 478. See *Beneficial Nat. Bank*, 539 U. S. at 6.

judicial responsibilities" (*Grable*, 125 S. Ct. at 2368) that this Court has endeavored to maintain for more than a century. That balance should not now be disturbed. Having applied the controlling principles that this Court has developed and reaffirmed, the decision below does not warrant reconsideration by the Fourth Circuit.

CONCLUSION

For each of the foregoing reasons, the petition for a writ of certiorari should be denied.

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Supreme Court of the United States

CELLCO PARTNERSHIP, *et al.*,
Petitioners,

v.

J. DOUGLAS PINNEY, *et al.*,
Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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INTRODUCTION

Respondents acknowledge that this Court's decision in *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 125 S. Ct. 2363 (2005), "concluded that there is 'no single, precise, all-embracing' test for identifying federal questions that will support jurisdiction under 28 U.S.C. § 1331," Opp. at 9 (quoting *Grable*, 125 S. Ct. at 2368), and that the court of appeals "lack[ed] the benefit of *Grable*" when it found jurisdiction lacking in the four cases that are the subject of the petition for writ of certiorari. Opp. at 10. Respondents also acknowledge that the court of appeals applied what appears to be a "single, precise, all-embracing" test: "[t]he 'essential element' test," under which an action is subject to substantial federal question jurisdiction only if "a particular element of a state law claim turns on federal law." Opp. at 13 (quoting Pet. at 11). Nonetheless, Respondents urge that GVR be denied for two reasons: that the "essential element" test employed by the court of appeals is consistent with pre-*Grable* precedent that was left undisturbed by *Grable*, *see* Opp. at 11-17; and second, that, if given the opportunity to reconsider its decision in light of *Grable*, the court of appeals is unlikely to change its result. *See* Opp. at (i), 17-19. Neither argument has merit.

Respondents' first argument reflects a basic misunderstanding of the nature and purpose of the substantial federal question doctrine. The substantial federal question doctrine exists to ensure that federal courts can adjudicate that narrow category of cases that raise important and disputed issues of federal law, even though the plaintiff has not elected to seek relief directly under federal law. *Grable* dictates that whether a given case falls within this category is based on a "contextual enquiry," 125 S. Ct. at 2370, not based on an inquiry that is limited to the words a given plaintiff happened to use in the complaint, or to the elements of the particular claims a given plaintiff happened to assert in the complaint. The substantial federal question doctrine serves as a safety

valve to ensure that substantial, disputed issues of federal law and policy are decided by the federal courts even –and perhaps especially – where a particular plaintiff seeks to avoid federal jurisdiction by omitting from the complaint all overt reference to the controlling federal law. Despite the fact that the substantial federal question doctrine is an exception to the "well-pleaded complaint rule," which governs jurisdictional analysis in other contexts, the Fourth Circuit essentially conflated two analyses, thus eliminating *Grable*'s contextual enquiry into the relationship between state claims and federal law.

Respondents are equally wrong to suggest that the court of appeals should not be given an opportunity to reconsider its decision in light of *Grable* because they claim reconsideration is not likely to result in a different outcome. As an initial matter, notwithstanding Respondents' self-serving characterization of their own complaints, *see* Opp. at 4-5, the complaints themselves reveal substantial connections to the Federal Communications Commission ("FCC") regulations that exclusively govern wireless telephone safety and safety testing. But more importantly, the "contextual enquiry" mandated by *Grable* requires more than examining the specific words Respondents happened to use in their complaints, and here reveals precisely what the district court and dissenting Senior Judge Kiser found below: that each of these four actions is a thinly disguised challenge to the validity and sufficiency of the FCC's radio frequency ("RF") safety and testing regulations, and thus are no less subject to federal jurisdiction than were the two challenges to those same regulations brought under the Hobbs Act, 5 U.S.C. §§ 701 *et seq.*, and rejected by the U.S. Courts of Appeals for the Second and District of Columbia Circuits.

Even granting the possibility that the Fourth Circuit panel might reach the same result after reconsideration, corrective action is independently justified. The court of appeals should be afforded the opportunity to articulate, consis-

tent with *Grable*, the analysis that courts in the Fourth Circuit will be required to employ in future cases involving the substantial federal question doctrine.[1]

ARGUMENT

I. THE NARROW AND RIGID TEST APPLIED BY THE COURT OF APPEALS AND DEFENDED BY RESPONDENTS IS INCONSISTENT WITH GRABLE AND ITS PROGENY.

Respondents rely heavily on the propositions that pre-*Grable* case law recognized a narrow "essential element" test for substantial federal question jurisdiction, *see* Opp. at 10-11, and that *Grable* does not call that approach into question. *See id.* at 12-14. Respondents are incorrect on both counts.

Before *Grable*, numerous courts of appeals had recognized substantial federal question jurisdiction in cases where no specific element of a state-law claim turned on a determination of federal law. Petitioners previously identified two examples of cases – *Torres v. Southern Peru Copper Corp.*, 113 F.3d 540 (5th Cir. 1997), and *In re Otter Tail Power Co.*, 116 F.3d 1207 (8th Cir. 1997) – in which courts of appeals found substantial federal question jurisdiction despite the fact that no specific element of a specific state-law claim required a determination of federal law. In both cases, the courts considered all the connections – explicit and implicit – between the complaint allegations and underlying federal

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[1] Respondents concede the existence of appellate jurisdiction, while implying that "the literal terms of 28 U.S.C. § 1447(d)" might call this Court's jurisdiction into question. Opp. at 9 n.4. The "literal terms of" Section 1447(d) do not apply here at all, since Petitioners are not seeking review of "[a]n order remanding a case to the State court." 28 U.S.C. § 1447(d). On the contrary, the jurisdictional order at issue in this case is an order of the district court *denying* remand, which order was reversed and remanded to the district court by the court of appeals and is now presented to this Court. *See Aetna Cas. & Sur. Co. v. Flowers*, 330 U.S. 464, 466-67 (1947).

interests in concluding that substantial federal question jurisdiction existed. The *Torres* court, for example, found it jurisdictionally significant that "the Peruvian government ha[d] participated substantially in the activities for which" the defendant was being sued, that the "[Peruvian] government extensively regulates the mining industry," and that the action "strikes not only at vital economic interests but also at Peru's sovereign interests by seeking damages for activities and policies in which the government actively has been engaged." 113 F.3d at 543. Thus, contrary to Respondents' suggestion, pre-*Grable* case law outside the Fourth Circuit recognized that substantial federal question jurisdiction could arise because a plaintiff's state-law claims, although avoiding citation to federal law, inevitably required adjudication of the meaning or validity of federal law or because the relief sought directly implicated federal law. It is telling that neither *Torres* nor *Otter Tail*, both of which were discussed in the petition, are addressed in Respondents' brief.

Of course, before it handed down its decision in this case, the Fourth Circuit itself had recognized that substantial federal question jurisdiction could exist even if no specific element of an asserted state-law cause of action turned on an interpretation of federal law. *See Ormet Corp. v. Ohio Power Co.*, 98 F.3d 799 (4th Cir. 1996). While Respondents correctly point out that one of the three panel judges in *Ormet* (though not its author) wrote the opinion below, *see* Opp. at 14 n.5, they provide no explanation for how *Ormet* – which approved substantial federal question jurisdiction over a breach-of-contract action because the subject of the contract, tradeable emissions permits, were created by the federal Clean Air Act – can be squared with the "essential element" test adopted by the panel majority below. Given this Court's citation of *Ormet* with approval in *Grable*, *see Grable*, 125 S. Ct. at 2366 n.2, the simple fact is that the opinion below has shifted doctrinal ground under this Court's feet. This fact alone provides more than sufficient

grounds to grant the petition, vacate the judgment below, and remand in light of *Grable*.[2]

However unfounded a narrow "essential element" test was before *Grable*, *Grable* and its progeny demonstrate that such a wooden test is no longer supportable. *Grable* itself makes clear that the mechanical "essential element" test, simple as it would be to apply, is both too broad and too narrow. It is too broad because, taken seriously, it would extend federal jurisdiction to every case in which a duty alleged to have been breached was a duty imposed by federal law; numerous negligence per se and nuisance cases could be federalized under the "essential element" standard. Rejecting that prospect, *Grable* states that the "mere need to apply federal law in a state-law claim will [not] suffice to open the 'arising under' door." 125 S. Ct. at 2367. Yet the "essential element" test is also too narrow because it excludes cases in which a "contextual enquiry" identifies "a serious federal interest in claiming the advantages thought to be inherent in a federal forum," *id.*, unless that federal interest can be specifically identified to an element of one of the asserted state-law claims.

Indeed, since this Court's decision in *Grable,* the lower courts have read it to preclude the kind of wooden formalism practiced by the court below. In *Municipality of San Juan v. Corporacion para el Fomento Economico de la Ciudad Capital*, 415 F.3d 145 (1st Cir. 2005), for example, the First Circuit cited *Grable* and found substantial federal question jurisdiction because "the propriety of [the defendant's] conduct turns entirely on its adherence to the intricate and detailed set of federal regulatory requirements, and the funds at issue are federal grant monies." *Id.* at 148 n.6. In *Wisconsin*

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[2] Given the Fourth Circuit's extensive efforts to distinguish *Ormet* in the opinion below, *see* Pet. App. 22a-25a, it is hard to argue that reconsideration in light of *Grable* would not affect the result here. If even one member of the majority below finds the panel opinion's treatment of *Ormet* no longer sustainable in light of *Grable*, the result would change.